

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:)	1 CA-CV 05-0461
)	
ANNE MARIE DAVIS,)	DEPARTMENT D
)	
Petitioner-Appellee,)	MEMORANDUM DECISION
)	
and)	
)	(Not for Publication -
EARNEST WAYNE DAVIS,)	Rule 28, Arizona Rules
)	of Civil Appellate Procedure)
Respondent-Appellant.)	FILED 3-15-07
)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2004-012699

The Honorable Edward O. Burke

AFFIRMED

Earnest Wayne Davis, Appellant
In Propria Persona

Mesa

Alan Cook
Attorney for Appellee

Phoenix

W E I S B E R G, Judge

¶1 Earnest Wayne Davis ("Husband") appeals from the trial court's awards of property and child custody in its decree annulling his marriage to Anne Marie Davis ("Wife"). For the reasons discussed below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2005, Wife filed for dissolution of her marriage with Husband, arguing that the marriage was

irretrievably broken. See Ariz. Rev. Stat. ("A.R.S") § 25-311 (2007) *et seq.* The petition, however, was later amended to request an annulment based on the allegation that Husband was still married to his previous wife, Joy Ann Campbell, at the time he and Wife were married, rendering their marriage null and void.

¶3 At the time Wife filed her petition for dissolution, she and Husband had been married for almost ten years with three minor children. Following a trial in June 2005, the trial court entered a decree of dissolution, annulling the marriage pursuant to A.R.S. § (2007) because Husband had still been married when he and Wife wed on March 12, 1995 in Las Vegas, Nevada. The decree awarded Wife sole custody of the children and \$795 in monthly child support. Additionally, the court awarded Wife the residence, furnishings and appliances, one vehicle, a waste credit of \$20,000, a monetary award of \$10,500 as an equalization payment, and attorney's fees. The remainder of the property, including four vehicles, was awarded to Husband. Husband filed a timely appeal, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

STANDARD OF REVIEW

¶4 Rulings in equity, such as division of property and child custody, will not be disturbed absent an abuse of discretion, that is, when the record is devoid of competent

evidence to support it. See *Fuentes v. Fuentes*, 209 Ariz. 51, 54, ¶ 10, 97 P.3d 876, 879 (App. 2004). However, whether a spouse is entitled to an annulment under A.R.S. § 25-301 and how property should be divided after an annulment are questions of law reviewed *de novo*. *Hodges v. Hodges*, 118 Ariz. 572, 573-74, 578 P.2d 1001, 1001-02 (App. 1978); see *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 19, 960 P.2d 55, 60 (App. 1998) (questions of law are reviewed *de novo*).

DISCUSSION

¶5 Husband argues that the trial court erred in granting Wife an annulment and awarding her property rather than cash. Additionally, Husband argues that the trial court abused its discretion when it awarded Wife the house and sole custody of the children.¹ We disagree.

¹Additionally, Husband complained that the trial court granted Wife's motion in limine and would not allow him to present certain witnesses and evidence. The only information provided in the record for the motion is a minute entry that states Wife's motion to exclude Husband's exhibits and witnesses for lack of timely disclosure was granted, and the parties agreed to proceed without Husband's witnesses. However, Husband failed to provide a transcript of the proceedings, therefore, we cannot review whether the trial court abused its discretion in granting the motion. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 506, ¶ 9, 114 P.3d 853, 838 (App. 2005) (absent a record of the proceedings, "we must presume that the trial court found every fact necessary to support its judgment").

Annulment under A.R.S. § 25-301

¶6 Husband argues that the trial court should not have granted Wife's petition for annulment because the court erroneously found that Husband was still married to Joy Ann Campbell. Husband contends that the alleged marriage to Joy Ann Campbell was a hoax, the marriage license was never filed, and therefore, they were never legally married. Even if it were legal, he argues, his marriage to Joy was annulled by a California court prior to his marriage to Wife. Additionally, Husband argues that as part of an annulment decree, the trial court did not have the authority to divide the property under the rules of equity, but could have only granted Wife her share of the property in cash.

¶7 "Superior Courts may dissolve a marriage, and may adjudge a marriage to be null and void when the cause alleged constitutes an impediment rendering the marriage void." A.R.S. § 25-301. Generally, a marriage is invalid if it was entered into while one of the parties was still legally married to another living spouse.² *Cross v. Cross*, 94 Ariz. 28, 30-31, 381 P.2d 573, 574-75 (1963). Annulment proceedings are, therefore, proper when the facts allege that one of the parties to the marriage was still married to a prior spouse.

²Nevada law provides that "a husband or wife living" may not be joined in marriage. Nev. Rev. Stat. ("N.R.S.") § 122.020. Additionally, both Nevada and Arizona criminalize bigamy as a felony. A.R.S. § 13-3606(A) (2001); N.R.S. § 201.160.

¶8 Here, the record reflects that Husband married Joy Ann Campbell on March 22, 1981. Joy filed a petition for dissolution of her marriage to Husband on May 9, 1994. The California court did not issue the final judgment of dissolution and nullity until November 14, 1995, and there was no indication that the judgment related back to the original May 9, 1994 filing date. Based on these facts, Husband was still legally married to Joy when he married Wife on March 12, 1995. Therefore, the trial court correctly determined that Husband and Wife's marriage was a nullity.

Division of Property

¶9 Husband also argues that the trial court should not have divided the property under the rules of equity since the marriage was annulled, and should have instead awarded Wife her share of the property in cash. Additionally, Husband argues that the trial court's division of property was not supported by the evidence. He asserts that the trial court's decision fails to take into consideration his contributions to the property and improvements thereon, that the value given the house was erroneously based on an old assessment, that all the furnishings in the house were owned by him prior to the marriage, and that he should not be penalized \$20,000 for waste because the money he obtained from the sale of vehicles was used to pay community debts.

¶10 Under A.R.S. § 25-302(B) (2007), the trial court shall divide the property of the parties and assign rights and obligations with respect to the common children. The trial court maintains the same powers of equity in annulment proceedings as it has in dissolution proceedings. *Hodges*, 118 Ariz. at 576, 578 P.2d at 1005. "[T]he court shall order such division of the property of the parties 'as to the court seems just and right'." *Wick v. Wick*, 107 Ariz. 382, 385, 489 P.2d 19, 22 (1971) (citation omitted). Equal distribution of the property is not required, so long as the disposition of the property is equitable and fair. *Id.* The trial court is given broad discretion when making a fair and equitable division of property, and we will not intervene unless there is a manifest abuse of that discretion. *Id.*

¶11 Here, the court identified the assets of Husband and Wife as follows: (1) the marital residence with \$31,000 in equity; (2) all the furnishings and appliances at the residence worth \$5,000; (3) a dragster worth \$15,000, which was sold by Husband prior to the filing of the petition for divorce; (4) a "funny car" worth \$30,000; (5) an 18-wheel freightliner tractor and trailer worth \$20,000; (6) miscellaneous automotive engines and parts; (7) a Plymouth PT Cruiser with no equity; (8) a Dodge Dakota pick-up truck worth \$6,000; (8) a motor home with no

value; (9) a Cobalt boat and trailer, which Husband sold for \$8,000 and kept the proceeds.

¶12 Wife was awarded the marital home, the furnishings and appliances inside, and the PT Cruiser, for a total value of approximately \$36,000. The trial court awarded Husband the funny car, freightliner, motor home, Dodge pick-up truck, and a golf cart, for a total value of approximately \$57,000. In order to equalize the distribution, the trial court awarded Wife the sum of \$10,500. Additionally, Wife was awarded \$20,000 in waste, which represents her share of the value of the dragster, boats, and trailer sold by Husband without Wife's consent.³ Without a transcript, we presume that there was substantial evidence on the record to support the trial court's valuations and awards.⁴ *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993). Accordingly, the trial court did not abuse its

³The selling of substantial assets by one spouse who then withholds the profits from the other spouse just prior to the filing of a dissolution petition constitutes waste and may be taken into account by the trial court when apportioning assets. A.R.S. § 25-318(A) (2007); *Hrudka v. Hrudka*, 186 Ariz. 84, 93, 919 P.2d 179, 188 (App. 1995). Although the division of property must be equitable, it need not be equal and the trial court may make adjustments to accommodate the necessities of the situation. *Martin v. Martin*, 156 Ariz. 452, 458, 752 P.2d 1038, 1044 (1988). Here, without a transcript, we will presume that there was sufficient evidence to support the trial court's award of \$20,000 in waste to Wife. *Double AA Builders*, 210 Ariz. at 506, ¶9, 114 P.3d at 838.

⁴Rule 11 of the Arizona Rules of Civil Appellate Procedure states that the Appellant has the obligation of providing a transcript of the trial court proceedings in the record on appeal, which Husband has not done.

discretion in awarding the house, furnishings and appliances, and vehicle to Wife.

Child Custody

¶13 Finally, Husband argues that the evidence was insufficient to support the trial court's determination that Wife should have sole custody of the children. Husband bases his argument on the contention that the trial court erroneously relied on the testimony and reports from Wife's expert witnesses, Wife's "perjured" statements, and gave unjustified credibility to the testimony of Wife's witnesses.⁵

¶14 As previously noted, in annulment proceedings the trial court has the authority to determine child custody under A.R.S. § 25-302(B). When determining child custody, the trial court decides what is in the best interest of the child under the factors set forth in A.R.S. § 25-403(A) (2007). We will not reweigh the evidence; instead we give deference to the trial court's opportunity to judge the credibility of the witnesses, and we will affirm the trial court's ruling if substantial evidence supports it. *Double AA Builders*, 210 Ariz. at 511, ¶ 41, 114 P.3d at 843; *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). Additionally, "[w]e will consider only those matters in the record before us and presume

⁵Because there is no transcript of the trial court proceedings in the record on appeal, we cannot address Husband's arguments regarding witness testimony at trial.

that, as to matters not in our record, the record before the trial court supported its ruling." *Lewis*, 178 Ariz. at 338, 873 P.2d at 676.

¶15 Here, the trial court found that although Husband has a good relationship with his children, there was evidence that Husband was grooming them for a sexual relationship with him. Additionally, the trial court relied on its factual determination that Husband seduced Wife when she was fourteen years old, while he was acting as her step-father, and that Husband continued to have a sexual relationship with Wife until they married when she was nineteen. The trial court noted that "Husband's mental health is a serious concern," that his actions had a traumatic effect on Wife, and that he had issues with boundaries and telling the truth. The trial court concluded that clear and convincing evidence showed Husband was a danger to his children and it was in the children's best interest that Wife have sole custody. Husband was granted supervised visitation with the children. In light of the facts found by the trial court, it was not an abuse of discretion to grant Wife sole custody of the children pursuant to A.R.S. § 25-403(A).

CONCLUSION

¶16 For the reasons discussed above, we affirm the trial court's awards of property, child custody and child support. Because Husband took unreasonable positions on appeal, we award

Wife her reasonable attorney's fees on appeal in accordance with A.R.S. § 25-324 (2007). Also, as the prevailing party, Wife is awarded her costs on appeal subject to her compliance with Arizona Rule of Civil Appellate Procedure 21.

SHELDON H. WEISBERG, Judge

CONCURRING:

LAWRENCE F. WINTHROP, Presiding Judge

SUSAN A. EHRLICH, Judge